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Supreme Court, U.S
FILED
JAN 5 1994
OFFICE OF THE CLERK

No. 93-704

In the Supreme Court of the United States

OCTOBER TERM, 1993

ALFRED V. BOTTONE, SR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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13 pp

QUESTION PRESENTED

Whether a civil forfeiture action and a criminal indictment were properly regarded as parts of a single proceeding, for double jeopardy purposes, when both actions were commenced on the same day with arrest and seizure warrants issued by the same magistrate judge, the civil complaint incorporated the criminal indictment, and the properties involved in the settlement of the civil action included those named in the criminal forfeiture count of the indictment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Bradley, In re, 318 U.S. 50 (1943)	7
Lange, Ex parte, 85 U.S. (19 Wall.) 163 (1874)	7
United States v. *Halper*, 490 U.S. 435 (1989)	3, 6
United States v. *Marcus Schloss & Co.*, 724 F. Supp. 1123 (S.D.N.Y. 1989)	9
United States v. *Park*, 947 F.2d 130 (1991), modified, 951 F.2d 634 (5th Cir. 1992)	7, 8
United States v. *Sanchez-Escareno*, 950 F.2d 193 (5th Cir. 1991), cert. denied, 113 S. Ct. 123 (1992)	7, 8

Constitution and statutes:

U.S. Const. Amend. V (Double Jeopardy Clause)	4, 5, 7, 8
18 U.S.C. 981	2
21 U.S.C. 846	2
21 U.S.C. 853	2
21 U.S.C. 853(e)(1)(A)	2
21 U.S.C. 881	2

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 2 F.3d 17. The opinion of the district court denying a motion to dismiss the indictment (Pet. App. 23a-33a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 1993. The petition for a writ of certiorari was filed on November 3, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arose from an investigation by the Drug Enforcement Administration into a large-scale heroin distribution organization operating in New York City and Westchester County, New York. Pet. App. 7a; Gov't C.A. Br. 3. On July 30, 1991, a federal magistrate judge in the Southern District of New York issued arrest warrants for more than 40 individuals, including petitioners. The same magistrate judge issued seizure warrants on the same day for various assets alleged either to have facilitated narcotics trafficking or to constitute proceeds of the illegal activity, pursuant to civil forfeiture statutes, 18 U.S.C. 981 and 21 U.S.C. 881. Pet. App. 7a; Gov't C.A. Br. 3-4. Included in the assets seized under the civil forfeiture warrants was the "Auction Cars" used car business. Pet. App. 8a; Gov't C.A. Br. 4.

On August 14, 1991, an indictment was returned in the Southern District of New York charging petitioners and 33 others with, *inter alia*, conspiracy to distribute and to possess with intent to distribute "massive amounts of heroin," in violation of 21 U.S.C. 846. The indictment contained a criminal forfeiture count against petitioners and others, under 21 U.S.C. 853. Two days after the return of the indictment, on August 16, 1991, the federal district court issued a restraining order, pursuant to 21 U.S.C. 853(e)(1)(A), preventing various of the defendants, including petitioners, from transferring or dissipating the properties named in the criminal forfeiture count of the indictment. Pet. App. 8a-9a; Gov't C.A. Br. 5.

On October 2, 1991, at a pretrial conference, petitioners claimed that they lacked the funds necessary

to pay their attorneys' fees. Instead of filing a motion for release of some of the restrained assets, however, petitioners began settlement negotiations with the government concerning all the assets involved in the August 1 civil seizures and the August 16 restraining order. Pet. App. 9a.

Meanwhile, petitioner Alfred Bottone, Jr., filed an administrative claim challenging the seizure of Auction Cars. Pet. App. 9a; Gov't C.A. Br. 6. In response to that claim, the government on December 26, 1991, filed an *in rem* civil forfeiture complaint against Auction Cars and its assets. Only Alfred Bottone, Jr., appeared as a claimant in that action. Pet. App. 10a; Gov't C.A. Br. 6.

The negotiations regarding the release of assets for attorneys' fees resulted in a Stipulation and Order executed on January 20, 1993. In the Stipulation and Order, the government agreed to release $101,000 in cash as well as various other assets in order to enable petitioners to pay their attorneys' fees in the pending criminal case. In return, petitioners agreed to forfeit to the United States certain other properties, which included approximately $236,804 in bank deposits, two parcels of real estate, and interests in two businesses; they also agreed to renounce any claim to certain other properties. Pursuant to the Stipulation and Order, the government agreed to dismiss the civil forfeiture case. Pet. App. 11a; Gov't C.A. Br. 7.

2. On February 23, 1993, petitioners filed a motion to dismiss the indictment. Pet. App. 12a. Relying on this Court's decision in *United States* v. *Halper*, 490 U.S. 435 (1989), they argued that the settlement agreement constituted "punishment" within the meaning of the Double Jeopardy Clause and that a

criminal prosecution based on the same conduct was therefore barred.

The district court denied the motion. The court found that "the criminal case against the defendants and the simultaneous civil proceedings against their property constitute a single, coordinated prosecution for alleged violations of the federal narcotics laws." Pet. App. 30a. The district court also found that petitioners had failed to meet their burden of demonstrating that the value of the seized property was overwhelmingly disproportionate to the value of the controlled substances at issue in the case, so that it could not be said that the civil forfeiture was punitive, rather than merely compensatory. *Id.* at 31a. Finally, the district court noted that because petitioners had voluntarily agreed to the terms of the settlement of their civil claims, they could not "now use this fact to obstruct a criminal prosecution on the underlying narcotics violations." *Id.* at 32a.

3. The court of appeals affirmed. The court noted that this Court's decision in *Halper* established that a civil fine could constitute punishment within the meaning of the Double Jeopardy Clause if it was "overwhelmingly disproportionate" to the government's actual losses, but that this Court also made clear that its holding did not apply to multiple sanctions arising from a single proceeding. Pet. App. 14a-16a. Considering the circumstances of this case, the court of appeals agreed with the district court that "the civil and criminal actions were but different prongs of a single prosecution of [petitioners] by the government." Pet. App. 18a-19a. The court based its conclusion on several factors: (1) warrants for the civil seizures and criminal arrests were issued on the

same day by the same judge, based on the same affidavit; (2) the settlement agreement concerned both properties involved in the criminal proceeding and properties named in the criminal case; (3) the civil complaint incorporated the criminal indictment; and (4) petitioners were aware of the criminal charges against them when they entered the settlement agreement. Pet. App. 18a.[1]

ARGUMENT

Petitioners renew their contention (Pet. 14-23) that the Double Jeopardy Clause bars the criminal action against them, because they have already suffered "punishment" as a result of the settlement of their civil forfeiture claims. They argue that the court of appeals erred in finding that the civil and criminal actions in this case were all part of one proceeding against them for purposes of the Double Jeopaerdy Clause. That claim is without merit.

This Court stated explicitly in *United States* v. *Halper*, *supra*, that its decision did not "prevent the Government from seeking and obtaining both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding." 490

[1] Although the civil and criminal actions were filed separately and had different docket numbers, the court of appeals explained that separate treatment of the civil and criminal actions was simply the consequence of the different rules of procedure applicable to civil and criminal cases. The court found that it was clear from the simultaneous initiation of the cases (when the arrest and seizure warrants were issued) and the coordinated actions taken in the civil and criminal cases that the criminal prosecution and the civil forfeiture suit were in all material respects parts of a single proceeding against petitioners. Pet. App. 19a-20a.

U.S. at 450. The district court and the court of appeals correctly concluded, based on all the relevant circumstances, that the civil forfeiture action and the criminal indictment were parts of a single, concerted effort to prosecute petitioners for their criminal violations and to forfeit the proceeds of their alleged illegal activities. As the court of appeals noted, it was impossible procedurally to join the civil forfeiture action with the criminal indictment in a single suit with a single docket number. Pet. App. 19a. Everything else, however, pointed to a conclusion that the civil and criminal actions were part of a single proceeding against petitioners. Both the civil and the criminal aspects of the case were begun on the same day, when arrest warrants for the individuals and seizure warrants for the property were all issued by the same magistrate judge, based on the same affidavit. The civil complaint, filed four months after the indictment was returned (but well before trial), incorporated the indictment. And the property sought to be forfeited had already been seized pursuant to the warrants at the time the criminal complaint was filed. *Id.* at 18a; Gov't C.A. Br. 11-12, 15. What is more, the settlement agreement entered into by petitioners involved some properties that were the subject of the criminal indictment and others that were part of the civil action. It is thus clear that the civil and criminal actions were interrelated and constituted but different aspects of a single proceeding against petitioners and their property. Pet. App. 18a.

Petitioners cite *In re Bradley*, 318 U.S. 50 (1943), and *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1874), in support of their argument, but those cases are

inapposite. Both cases dealt with multiple punishments but had nothing to do with the question of what constitutes separate proceedings. Each case involved an erroneous sentence, because the court imposed both a fine and imprisonment when the applicable statute authorized only one or the other, but not both. In each case this Court held that the defendant's payment of the fine extinguished the court's power to amend the sentence to impose only imprisonment. Once the payment had been made, the defendant had suffered one of the alternative punishments the law authorized, and the court could not impose a second punishment without violating the Double Jeopardy Clause. In this case, it is not disputed that the government had the power to seek both criminal and civil penalties against petitioners, and that if the penalties were imposed as part of a single proceeding, the Double Jeopardy Clause would not be implicated.

Petitioners also claim a conflict with decisions from the Fifth Circuit in *United States* v. *Sanchez-Escareno*, 950 F.2d 193 (1991), cert. denied, 113 S. Ct. 123 (1992), and *United States* v. *Park*, 947 F.2d 130 (1991), modified on other grounds, 951 F.2d 634 (1992), but neither of those decisions is inconsistent with the decision in this case. In *Sanchez-Escareno*, the issue was not whether civil and criminal proceedings were separate, but whether an unpaid civil assessment that the government never sought to enforce could be considered "punishment" so as to bar a criminal prosecution. The defendants were assessed civil penalties when they entered the United States with drugs in their cars, and they signed promissory notes agreeing to pay the fines to the United States. But no civil actions to enforce the notes were ever

instituted; instead the government chose to proceed with criminal prosecutions. The court of appeals held that because the defendants had never made any payment on the notes, and no judgments were ever entered requiring payment, the defendants had not been "punished" within the meaning of the Double Jeopardy Clause. 950 F.2d at 201-203. No question of single or separate proceedings was before the court; the only question that the court addressed was whether the notes by themselves, in the absence of any payment or judgment, could be considered punishment.

In *United States* v. *Park*, *supra*, the court also held only that no civil penalty had been imposed. When the defendant failed to declare $48,000 in currency as he boarded a flight leaving the country, the currency was seized and held by Customs officials. The defendant was later charged with and convicted of criminal violations of currency reporting requirements. Civil forfeiture proceedings were not instituted, but were held in abeyance pending the outcome of the criminal prosecution. 947 F.2d at 135. In those circumstances, the court of appeals held that no civil penalty had been imposed and hence that there was no double jeopardy bar to his criminal conviction. 947 F.2d at 134-135. Again, because no civil proceeding had been instituted, the court had no occasion to address the question whether the civil and criminal actions could be considered part of a single proceeding.[2]

[2] It is also significant that petitioners had knowledge of the criminal charges against them when they voluntarily agreed to a settlement of the civil forfeiture action. Although the court of appeals did not address that aspect of the district court's

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1994

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analysis, those circumstances should be deemed to give rise to a waiver of any double jeopardy claim. See *United States* v. *Marcus Schloss & Co.*, 724 F. Supp. 1123, 1127 (S.D.N.Y. 1989).